84-1536

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ALEXANDER L. STEVAS,
CLERK

No._____

IN THE UNITED STATES SUPREME COURT

October Term
1984

LEON CLARK,

Petitioner,

vs.

MAX CLELAND, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Leon Clark
Petitioner Pro Se
406 North 29th
Muskogee, Okla. 74401
(918) 683-9258

QUESTIONS PRESENTED FOR REVIEW

1. Whether the same criteria applicable to private employers in determining illegal discrimination in employment is also applicable to agencies of the federal government?

2. Whether an agency of the federal government can legally terminate a black employee for inadequate performance of his job and retain a caucasion employee who is unable to perform the same job the black employee was terminated from without violating anti-discrimination laws in employment?

3. Whether employment discrimination decisions of the Supreme Court apply to agencies of the federal government located in the Eastern District of Oklahoma?

[1]. The Defendant Max Cleland was the administrative head of the Veterans Administration at the time this suit was filed. He and his successors have been sued in their representative capacity.

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OPINIONS BELOW

This cause was tried before the Honorable Frank Seay in the Eastern District of Oklahoma. The Judge's opinion was filed on June 30, 1983. A decision on appeal was issued by the Tenth Circuit Court of Appeals on October 29, 1984. Petitioner is unaware of any official reports of those opinions. Both opinions are included in the appendix attached hereto.

JURISDICTION

The judgment of the 10th Circuit Court of Appeals was issued on October 29, 1984. A timely petition for rehearing was denied on December 3, 1984. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

This cause involves 42 U.S.C. §2000 (e) et seq.

STATEMENT OF CASE

Petitioner, a black male resident of Muskogee, Oklahoma filed this action as a result of his termination from his employment with the Veterans Administration Regional Office in Muskogee, Oklahoma. At the time of Petitioner's termination he was classified as a GS-9. Petitioner exhausted all administrative remedies and filed this action in federal court pursuant to 42 U.S.C. §2000 (e) et seq.

Unrebutted evidence at the trial of this cause clearly established Petitioner was the only employee at the level of GS-9 or above ever terminated at the regional office in Muskogee for inadequate performance of the job. Petitioner allegedly was terminated for inadequate performance of his job as a claims examiner. At the trial of this cause a caucasian employee employed during the same time period as Petitioner admitted that he could not perform the job of claims examiner and was thereafter given a filing job, without any demotion in rank or pay.

Petitioner also produced at the trial testimony of other employees concerning glaring errors made by another caucasian employee where duplicate car payments were erroneously allowed to veterans. However, despite Petitioner's evidence of disparate treatment and pretext the trial judge entered a judgment that Petitioner was not the victim of illegal racial discrimination. The judgment of the trial court was affirmed by a three judge panel. Petitioner's request for an en banc rehearing was denied and Petitioner herewith brings his prayer for relief before this Honorable Court.

ARGUMENT

Petitioner's claim of illegal discrimination in his termination from his employment with the federal government is directly analogous to the facts in *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 668 (1976).

Petitioner, a black male was classified in his employment with the federal government as a GS-9. The evidence at the trial of this cause was

unrebutted that Petitioner was the only employee at the level of GS-9 or above ever terminated at the Muskogee regional office for inadequate performance. The Respondents stipulated during the trial of this cause that a caucasian employee who could not perform the same job Petitioner was terminated from did not suffer any type of demotion or retribution.

In *McDonald*, supra this Court stated the following in regards to a claim of disparate treatment:

> We find this case indistinguishable from *McDonnell Douglas*. Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white. See *Conley v. Gibson*, 355 U.S. 41, 45-46, L.Ed. 2d 80, 78 S.Ct. 99 (1957) "(Footnote omitted) While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races," and Title VII is violated if as petitioner's alleged, it was not. *Id.* at 282, 283.

In the case at bar Petitioner presented a plethora of evidence to show that Respondent applied different criteria to himself and other caucasian employees of the Respondent. Petitioner also presented lucid evidence to show Respondent's stated reason for Petitioner's termination was merely a pretext, as other caucasian employees of Respondent the same classification or higher than Petitioner were given preferential treatment.

The trial court merely ignored Petitioner's lucid and unrebutted evidence of disparate treatment between himself and the other caucasian employees. The appeals court succinctly stated and concluded that the situations of Petitioner and the caucasian employees he sought to compare himself with were different; however no explanation was given by the court of how Petitioner's situation was different from that of the caucasian employees as all three were employed by the same federal agency, during the same time span, and they all were suppose to perform the same job.

The case at bar and *McDonald* are indistinguishable. While the Respondent may decide that certain criteria render the Petitioner unqualified for employment, this criteria must be applied alike to members of all races or else Title VII is violated if it is not. Respondent admits a caucasian employee at the level of GS-9 was not terminated when he could not perform the job of claim examiner. Petitioner was allegedly terminated because his performance as a claims examiner was inadequate. There is no legal reason to distinguish Petitioner from the caucasian employee who was not terminated. Both were at the level of GS-9. Both worked in the same department, under the same supervisors, performing the same job. The only distinction between them is Petitioner is black, the favored employee who was not terminated is white.

McDonald and its progeny have clearly established that the same criteria must be applied to members of all races when considering claims of illegal discrimination in employment. Throughout these entire proceedings Petitioner has alleged disparate treatment between himself and other caucasian employees. The trial court completely disregarded all of Petitioner's contentions and cita-

tions of authority. The appeals court sanctioned the trial court's disregard of the applicable law in this cause without even one notation to *McDonald,* or any other decisions dealing with disparate treatment.

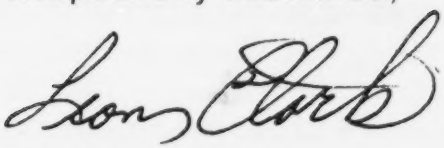
The law applicable to the facts of this cause has long been established, Petitioner urges that the granting of certiorari in this cause is important because the Veterans Administration as an agency of the federal government should be free from all vestiges of racial discrimination, not only in employment, but also in awarding benefits to those entitled to them.

The record in this cause clearly shows Petitioner was a victim of disparate treatment. To allow the decision in this cause to stand would in all practicality deny Petitioner a just adjudication of his claim of racial discrimination, and allow the Veterans Administration Regional Office in Muskogee, Oklahoma to continue its ways of discrimination against black inhabitants of the region.

The law applicable to the facts in this cause is beyond quibble. The issue presented by this case is whether the previous decisions of this Court prohibiting racial discrimination in employment will be recognized and applied to agencies of the federal government located in the Eastern District of Oklahoma. Petitioner considers said issue to be of the utmost importance, not only for himself but also all other potential victims of racial discrimination residing in the Eastern District of Oklahoma.

Petitioner contends and knows that this Court's decisions are the supreme law of the land and Petitioner respectfully prays this Honorable Court grant cert in this cause in order that this Court's dictates will not be ignored anywhere in this country.

Respectfully submitted,

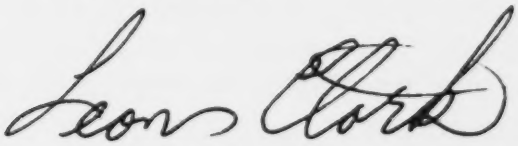


LEON CLARK
Petitioner
406 North 29th
Muskogee, OK 74401
(918) 683-9258

CERTIFICATE OF MAILING

A true and correct copy of the above Petition for Writ of Certiorari was sent by mail, postage pre-paid to the Solicitor General, Dept. of Justice, Washington, D.C. and the U.S. Attorney for the Eastern District of Oklahoma, on the 27th day of March, 1985.

LEON CLARK



IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

LEON CLARK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 81-2-C
MAX CLELAND, et al.,	)	
	)	
Defendants.	)	

OPINION

Plaintiff instituted this action against defendants Max Cleland and the Veterans Administration, his former employer, alleging discrimination based on race and retaliation, in violation of 42 U.S.C. §2000(e) et seq. seeking declaratory and injunctive relief and damages by reinstatement to his former position and employment with defendant Veterans Administration with back pay and benefits.

On January 18, 19, and 20, 1983, a non-jury trial was had in the case. Based upon all the evidence admitted and the credibility of the witnesses, the court makes the following findings of fact and conclusions of law, pursuant to Rule 52, Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiff is a black male citizen of the United States of America.

2. Plaintiff was employed as a claims adjudicator by the defendant Veterans Administration, an instrumentality of the United States of America, at its Muskogee, Oklahoma Veterans Administration Regional Office from October 24, 1974, until June 23, 1978, at which time plaintiff was discharged.

3. The plaintiff made administrative complaints that he was not selected for promotion on April 26, 1978, and that he was illegaly dismissed on June 23, 1978. He alleged that these actions were motivated by plaintiff's race, and that they were retaliation for earlier grievances filed by plaintiff. Both administrative complaints were unsuccessful.

4. A claims adjudicator with defendant Veterans Administration determines the entitlement of veterans to educational, medical, disability and pen-

sion benefits offered by the United States Government. Adjudicator trainees are hired at the rank of either General Schedule 5 (GS-5) or 7 (GS-7), depending upon their entry qualifications. They remain at the level of GS-5 or 7 trainee until they have the experience and training necessary to handle a normal caseload as a journeyman adjudicator at the GS-9 rank. Some GS-9 journeymen adjudicators are selected to become senior adjudicators at the GS-11 rank. A senior adjudicator performs the same work that a journeyman adjudicator performs, except that a senior adjudicator reviews the work of journeymen adjudicators, and assists in the training of adjudicator trainees.

5. Plaintiff started employment as a GS-5 and was a GS-9, journeyman adjudicator, when he was terminated.

6. Plaintiff filed grievances against the defendant Veterans Administration on two or three occasions including his failure to be promoted to a GS-11. Plaintiff testified that defendants' employees, his supervisors, harassed him due to his grievances and discriminated against him due to his race. However, neither plaintiff's witnesses nor defendants' witnesses corroborated the plaintiff's harassment or discrimination allegations, and the court gives little credibility to plaintiff's self- interest testimony in light of the great weight of credible testimony to the contrary.

7. Defendants' witnesses, plaintiff's supervisors, testified that plaintiff was terminated due to his unsatisfactory work performance.

Dennis Keely, plaintiffs, immediate supervisor, testified that plaintiff had trouble doing his work because of inadequate ability. He testified plaintiff had a great frequency of errors in spite of additional training and help from other personnel.

Further, he testified that he had to frequently give plaintiff's late work to others to complete. He concurred in the decision to terminate plaintiff due to the lack of quality of plaintiff's work.

Bob Carter, who authorized plaintiff's work, testified that plaintiff's error rate averaged fifty percent (50%) and that the plaintiff was the slowest worker and made more mistakes than anyone else in the unit. This error rate was corroborated by other credible witnesses. He testified that the plaintiff was given more opportunities to do the job than anyone else, but that plaintiff was not able to adequately do the work.

E. E. Webb, a chief in adjudication, and a higher level supervisor or plaintiff's, testified that plaintiff's work was below acceptable levels in quality and quantity, particularly quality. He testified that it was his decision to terminate plaintiff because he did not meet the job performance requirements, and his decision had nothing to do with race, prior complaints or grievances, or personality.

The court finds this testimony of defendants' witnesses corroborated by other witnesses of both the plaintiff and the defendants, and finds it is highly credible.

8. Other witnesses testifying for the defendants, some of whom were black and who had filed past grievances, testified that they were never discriminated against due to their race or grievances. No one other than plaintiff testified that the defendants, in any way, discriminated against the plaintiff due to his race or filing grievances.

9. The court finds the defendants sustained their burden by proving a legitimate, nondiscriminatory reason for the plaintiff's termination, i.e., unsatisfactory quality of work performance, and that said reason was not a pretext for the termination of

plaintiff, and that plaintiff wholly failed in sustaining his burden of proving that said proffered reason was lacking in factual basis or was pretextual.

CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant to 42 U.S.C. §2000(e), and venue pursuant to 28 U.S.C. Section 42 U.S.C. §2000(e) 5(f)(3) 1391(b), the claim herein arising in this district.

2. Defendant Veterans Administration is an employer within the meaning of 42 U.S.C. §2000(e).

3. The plaintiff must exhaust his administrative remedies, and the court has jurisdiction over all such remedies which are timely filed. 42 U.S.C. §200e-16(c). *Brown v. General Services Administration*, 425 U.S. 820 (1976), *Sampson v. Ciciletti*, 632 F.2d 860 (10th Cir. 1980).

4. The plaintiff has the burden of establishing a prima facie case in a Title VII, 42 U.S.C.§2000(e), et seq. claim, by proof:

A. That he belonged to a minority group protected by the statue;

B. That he desired to remain employed and was qualified for the position from which he was terminated;

C. That his work performance was satisfactory;

D. That despite his qualifications and satisfactory work performance he was terminated;

D. That defendants retained other than black employees whose job description was the same as plaintiff's and that these other black employees' job qualifications and work performances were either not as good as or were no

better than plaintiff's. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Hefferman v. Western Electric Co., Inc.*, 510 F.Supp. 712 (N.D. Ga. 1981).

5. Plaintiff made out a prima facie case of race and harrassment discrimination against defendants which creates a presumption that defendants unlawfully discriminated against plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, (1981).

6. The burden then shifts to the defendants to rebut the presumption of discrimination. They must produce evidence that plaintiff was terminated for a legitimate, nondiscriminatory reason. The defendants need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendants' evidence raises a genuine issue of fact as to whether they discriminated against the plaintiff. *Burdine, supra*, at pages 252-256.

7. Defendants have met their burden of rebutting the prima facie case by producing admissible evidence which causes the court to conclude that plaintiff's termination was for legitimate business reasons. *Burdine, supra*.

8. Plaintiff reatins the burden of persuasion and must prove that it is more probably true than not true that the reason for his termination, proffered by defendants, was not the true reason, which merges with the ultimate burden of proving intentional discrimination. *Burdine, supra*.

9. Plaintiff has not proved by the required burden of proof that the reason for his termination was not the one proffered by defendants, and has not proved intentional discrimination. Defendants

did not discriminate against plaintiff in connection with plaintiff's employment.

WHEREFORE, based on all the evidence and the above Findings of Fact and Conclusions of Law, the court finds the issues in favor of the defendants and against the plaintiff.

IT IS SO ORDERED this 30th day of June, 1983.

Frank H. Seay
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEON CLARK,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 83-1923
		(D.C. No. 81-2-C)
	)	(E.D. Okla.)
MAX CLELAND, et al.,	)	
	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT

Before SETH, BREITENSTEIN, and SEYMOUR, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Plaintiff argues on appeal that the trial court failed to make adequate findings to support its conclusion that plaintiff was not the object of either racial discrimination or retaliation within the meaning of Title VII, 42 U.S.C.§2000(e) *et. seq.* Plaintiff also contends that the findings are clearly erroneous.

Plaintiff, a black male, was terminated from his position as journeyman claims adjudicator with the Veterans Administration. The trial court found credible defendant's evidence that plaintiff made excessive errors in his work and was a low producer, and held that defendant had a legitimate business reason for terminating plaintiff. The court also held that plaintiff failed to sustain his burden of proving pretext.

Plaintiff's claim of inadequate findings is based on the trial court's failure to specifically address plaintiff's assertion that two white employees, Horace Rudolph and Les Melcher, made serious errors in their work but were not terminated. Plaintiff argues that the evidence establishes pretext. It is apparent from the record, however, that the situations of Rudolph and Melcher were so different from that of plaintiff that we cannot say the trial court was incorrect in failing to infer pretext from their different treatment. A court need not refer to all of the evidence in order to make adequate findings within the meaning under Fed. R. Civ. P. 52.

We may not overturn a trial court's findings of fact unless we have a definite and firm conviction

that they are wrong. *EEOC v. Gaddis*, 733 F.2d 1373, 1379 (10th Cir. 1984). In making this determination, we are required to give due regard to the trial judge's assessment of witness credibility. *Id.*; Fed. R. Civ. P. 52(a). We have carefully reviewed the entire record in this case, and we cannot say that the court's findings are clearly erroneous.

Affirmed.

HOWARD K. PHILLIPS
Court Clerk

By
Robert L. Hoecker
Chief Deputy

NOVEMBER TERM — December 3, 1984

Before Honorable William J. Holloway, Jr., Honorable Jean S. Breitenstein, Honorable Oliver Seth, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

LEON CLARK,	)	
	)	
Plaintiff-Appellant.	)	
	)	
vs.	)	No. 83-1923
MAX CLELAND, Administrator of VETERANS AFFAIRS, and his agents, assigns and successors in office, VETERANS ADMINISTRATION.	)	
	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

§2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer/

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization/

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individal because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in,

any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retaining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if/

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to embership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

Pub.L. 88-352 Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261 §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

§ 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to re-

spondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, concillation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence insubsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organizaton, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training program, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commended under State or local law pur-

suant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charge with Commission commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty

days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditional; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection

(c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, govermental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge

was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judical action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judical district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit juge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined,

that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is internationally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259;
Pub.L. 92-261, §4, Mar. 24, 1972, 86 Stat. 104

§2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it

deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall /

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit it order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination, filed by him therunder. The plan submitted by each department, agency, and unit shall include, but not be limited to /

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agen-

cy, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorites granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Pub.L. 88-352, Title VII, § 717, as added Pub.L. 92-261, § 11, Mar. 24, 1972, 86 Stat. 111, and amended 1978 Reorg. Plan No. 1, § 3, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 96-191, § 8(g), Feb. 15, 1980, 94 Stat. 34.